

E-Filed 4/14/10

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DORIAN W. GRAY,

No. C 10-00483 RS

Plaintiff,

v.

**ORDER LIFTING TEMPORARY
RESTRAINING ORDER AND
DENYING MOTION FOR
PRELIMINARY INJUNCTION**

CENTRAL MORTGAGE COMPANY, d/b/a
CENTRAL MORTGAGE LOAN
SERVICING COMPANY; MORTGAGE
ELECTRONIC REGISTRATION
SYSTEMS, INC.; PATRIOT FINANCIAL
CORPORATION; MTC FINANCIAL INC.,
d/b/a TRUSTEE CORPS; and ALVIN
BROWN,

Defendants.

This case concerns a dispute over a promissory note signed by plaintiff Dorian W. Gray. As security for the note, he executed a deed of trust on his home, located at 5753 Oakmont Drive, Richmond, California. The Court issued a temporary restraining order (“TRO”) enjoining foreclosure of the home. For the reasons stated herein, that order is dissolved and Gray’s subsequent motion for a preliminary injunction is denied.

I. BACKGROUND

1 According to the complaint and accompanying exhibits and declarations, Gray purchased his
2 home in December 2005. Shortly thereafter, in early January 2006, he signed an adjustable rate
3 promissory note for \$638,910.00. The lender was Downey Savings and Loan (“Downey”). *See*
4 Adjustable Rate Note, Exh 1. to Complaint. The loan was secured by a deed of trust on the
5 residence and was brokered by defendant Alvin Brown, an employee of defendant Patriot Financial
6 Corp. Under the terms of the note, Gray’s monthly payment was set at \$2,361.54. *Id.* at 2.
7 Allegedly, the loan documents did not contain a servicing notice, as required by RESPA, 12 U.S.C.
8 § 2605(a).

9 After about a year, the adjustable rate kicked in, and the amount due on Gray’s monthly
10 payments nearly doubled, to an amount Gray was unable to afford. At this time, Gray sought and
11 obtained copies of all his original loan documents, many of which, he alleges, had not been provided
12 to him when he signed the promissory note. Gray claims to have found significant discrepancies
13 when he reviewed these documents. For example, there was a letter describing the nature of Gray’s
14 business and purporting to bear his signature, which he alleges he never signed. Exh. 2 to Gray
15 Declaration. Also troubling was a letter from an individual named Gregory Hoofkin of Precise
16 Business Services, who stated that he was Gray’s accountant and that he had completed Gray’s tax
17 returns for seven years. Exh. 3 to Gray Declaration. Gray, however, states that he has never met
18 this individual nor engaged his services as an accountant. Both letters were addressed “To Whom It
19 May Concern,” and appear to have been forwarded by Patriot, the mortgage broker, to Downey, the
20 lender, as inducements to grant Gray’s loan application.

21 By February 10, 2009, three years after he had signed the original promissory note, Gray
22 was told he was \$37,468.33 in arrears. In May 2009, he received a notice of default from defendant
23 Trustee Corps, who represented that it was acting to secure obligations in favor of Downey. Notice
24 of Default, Exh. 3 to Complaint.

25 During the course of these events, Gray’s promissory note was being passed from lender to
26 lender. In November 2006, Downey assigned the Deed of Trust to defendant Mortgage Electronic
27 Registration Systems, Inc. (“MERS”). *See* Assignment of Deed of Trust, Exh. 2 to Complaint. In
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1 September 2009, MERS assigned the Deed of Trust to defendant Central Mortgage Company
2 (“Central”), and substituted DSL Service Company as Trustee. Exh. 4 to Complaint. On the same
3 day in September, Central re-substituted Trustee Corps as trustee. Exh. 5 to Complaint.

4 On October 15, 2009, Trustee Corps scheduled a trustee sale for November 11, 2009. Notice
5 of Trustee’s Sale, Exh. 6 to Complaint. On both November 5, 2009, and December 4, 2009, Gray
6 sent Central a Qualified Written Request (“QWR”) pursuant to RESPA, 12 U.S.C. § 2605(e).
7 RESPA requires Central, as loan servicer, to “provide a written response acknowledging receipt of
8 the correspondence within 20 days” and to respond substantively within 60 days. 12 U.S.C. §
9 2605(e)(1)(A) and (e)(2). Central, however, responded to neither of the two QWRs. Moreover,
10 according to Gray, during this time Central began notifying consumer credit agencies of his
11 arrearages, which severely impacted Gray’s credit score.

12 In February 2010, Gray filed a complaint alleging violations of the Real Estate Settlement
13 Procedures Act (“RESPA”) and applied for a TRO and a preliminary injunction to prevent the
14 foreclosure of his residence. On March 31, 2010, the Court granted the request for a TRO. The
15 TRO has now expired, and Gray now moves for a preliminary injunction. The motion was heard on
16 April 14, 2010.

17 II. LEGAL STANDARD

18 Injunctive relief, whether temporary or permanent, is an “extraordinary remedy, never
19 awarded as of right.” *Winter v. Natural Res. Defense Council*, 129 S. Ct. 365, 376 (2008);
20 *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). “A plaintiff seeking a preliminary
21 injunction must establish that he is likely to succeed on the merits, that he is likely to suffer
22 irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor,
23 and that an injunction is in the public interest.” *Am. Trucking Ass’ns, Inc. v. City of Los Angeles*,
24 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter* 129 S. Ct. at 374).

25 Moreover, “[a] preliminary injunction is generally only available if injunctive relief is
26 appropriate in the first instance.” *Chung v. NBGI, Inc.*, No. 09-04878 MHP, 2010 WL 841297
27 (N.D. Cal. Mar. 10, 2010); see *Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 546
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1 n. 12, (1987) (“The standard for a preliminary injunction is essentially the same as for a permanent
2 injunction with the exception that the plaintiff must show a likelihood of success on the merits
3 rather than actual success.”); *Sims Snowboards, Inc. v. Kelly*, 863 F.2d 643, 647 (9th Cir. 1988) (in
4 case involving diverse parties and state law claims, holding that preliminary injunction could not be
5 granted if such remedy was not available under state law). Therefore, the question before the Court
6 is not only whether Gray is likely to succeed in proving that the defendants violated RESPA, but
7 whether he is likely to receive injunctive relief as a remedy for any such violation.

8 III. DISCUSSION

9 The *Winter* factors were considered in the TRO. That order concluded all four factors
10 weighed in Gray’s favor, and no new argument or documentation has been submitted in the ensuing
11 time period that would prompt the Court to change its mind. See Temporary Restraining Order at
12 2-3. More questionable at this juncture, however, is whether Gray’s RESPA claims, even if he
13 succeeded on them, would entitle him to enjoin foreclosure and stay in his home.

14 12 U.S.C. § 2605, which is the section of RESPA upon which Gray relies, contains its own
15 damages and costs section. 12 U.S.C. § 2605(f). That section provides that individuals damaged by
16 a RESPA violation are entitled to receive actual damages, as well as any additional damages the
17 court may allow “in the case of a pattern or practice of noncompliance with the requirements of this
18 section, in an amount not to exceed \$1,000.” 12 U.S.C. § 2605(f)(1)(A) & (B). Costs and
19 reasonable attorney fees are also available to successful RESPA plaintiffs. 12 U.S.C. § 2605(f)(3).
20 None of these remedies, however, would permit an injunction against foreclosure. Numerous
21 district courts have denied preliminary injunctions to RESPA plaintiffs on this basis. *E.g., Chung*,
22 2010 WL 841297 at *3; *Montes v. Quality Loan Service Corp.*, No. CV 09-5864 PSG (RCx), 2010
23 WL 114485, at *2 (C.D. Cal. Jan. 5, 2010); *Pettie v. Saxon Mtg. Servs.*, No. C08-5089RBL, 2009
24 WL 1325947, at *3 (W.D. Wash. May 12, 2009). For this reason, Gray’s motion for a preliminary
25 injunction is ultimately not viable.

26 IV. CONCLUSION

1 Gray's motion for a preliminary injunction is accordingly denied. The temporary restraining
2 order entered March 31, 2010, is hereby dissolved.

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5 IT IS SO ORDERED.

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7 Dated: 4/14/2010



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9 RICHARD SEEBORG
10 UNITED STATES DISTRICT JUDGE
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